IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 206 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RUSTAMKHAN ASARAFKHAN SINCE D/D THROUGH HIS HEIRS

Versus

HEIRS OF GULABKHAN MISARIKHAN

Appearance:

MR M M Patel for Mr AJ PATEL for Petitioners

Mr T J Patel for Mr J M Patel for respondents

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 13/12/1999

ORAL JUDGEMENT

The present appeal is filed under Section 100 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') against the judgment and decree dated 23.12.1981 recorded by the learned Extra Asstt.Judge,

Nadiad in Regular Civil Appeal No.78/80, allowing the appeal against the judgment and decree in Regular Civil Suit No.139/74 dated 29.2.1980 recorded by the learned Civil Judge (JD) at Kheda.

2. The facts may be briefly stated as follows:

The appellant above named, had filed aforesaid Civil Suit being Regular Civil Suit No.139 of 1974 in the Court of learned Civil Judge (JD), Kheda. The present appellant contended therein that agricultural land bearing survey Nos. 348 and 349 described in the judgment of the Civil Court originally belonged to the grandfather of the parties and at the time when father of the appellant died, the appellant was minor and, therefore, his name was not mutated in Revenue Record, but the lands were mutated in the name of deceased Misarikhan, the grandfather of the first respondent. That in fact, the appellant had cleared the title over the said property and he was owner of the said land and since he was minor, he was staying with deceased Misarikhan. The land was also continued to be in the name of the deceased Misarikhan. That thereafter, the appellant became major and, therefore, the land was required to be mutated in the name of the petitioner. That therefore, writing was also executed which has been placed at Exh.36 under which the parties agreed that "these lands bearing survey Nos. 348 and 349 belong to the appellant, but it stood in the name of the deceased. However, the said lands should, hereinafter, be mutated in the name of the appellant". However, since the lands were managed by the deceased Misarikhan, the appellant should pay an amount of Rs.700/- and on such payment, the lands would be mutated in the name of the appellant. That though the writing was prepared and executed by the deceased Misarikhan, the lands were not mutated in the name of the appellant and the possession thereof was not actually and physically transferred to the appellant. The appellant, therefore, filed the aforesaid Civil Suit and claimed title and possession in respect of the said lands. In short, it was to be treated to be a suit for specific performance of the said agreement Exh.36. That the appellant made it clear that he was ready and willing to part with Rs.700/- in favour of deceased Misarikhan.

3. The suit was contested on behalf of the respondent by written statement Exh.12. There, the respondents have denied the allegations made in the plaint. They have also denied that appellant was the owner of the suit land bearing survey nos. 348 and 349. It was further denied that the lands simply stood in the

name of the deceased Misarikhan. It is further denied that there was agreement that the lands would be mutated in the name of the appellant on his paying a sum of Rs.700/- to deceased Misarikhan. That Therefore, the case of the respondent was that the appellant was not the owner of the suit land and, therefore, he was not entitled to any decree. Therefore, the respondent has prayed for dismissal of the suit.

4. The trial court framed necessary issues at Exh.14 and on appreciation of evidence, the trial court found that these properties were not actually belonging to the grandfather of the appellant and father of the deceased Misarikhan and the appellant became the owner by viratue of the said document Exh.36. It was also observed by the trial court that since the appellant was minor at the time of the death of his father, the land was mutated in the name of deceased Misarikhan. On appreciation of the said position, and particularly the document at Exh.36, the trial court found the issues in favour of the appellant and awarded the decree in terms of paras 7 (A), (B) and (C) of the plaint. The trial court also directed that the appellant shall deposit a sum of Rs.700/- within two months from the date of the decree and on such deposit, the respondents do deliver possession of the suit lands to the appellant. It was further directed by the trial court that the respondents shall get entered the suit land in the name of the appellant in Government records, after delivery of possession. It was further directed that if the respondents fail to do so, the appellant shall be at liberty to get his name entered in the Revenue Records of right. The trial court also directed the respondents to pay cost of the suit to the appellant and to bear their own costs in the suit.

5. Feeling aggrieved by the said judgment and decree of the trial court, the appellant preferred Civil Appeal bearing No.78/80. There the matter was heard at length and thereafter the learned Extra Asstt.Judge reversed the said finding of the trial court and hence the trial court has failed in holding that the document Exh.36 was duly proved. The learned appellate Judge has also considered various aspects of the case in para 10 of the judgment and found that the entire case was not proved by the appellant and as such the trial court had erred in holding that the appellant was the owner of the suit land bearing survey nos. 348 and 349. Ultimately, the learned Appellate Judge allowed the appeal and set aside the judgment and decree of the learned Civil Judge and directed that the suit be decreed with costs of the appellant before him.

6. Feeling aggrieved by the said judgment and decree of the learned Appellate Judge, the appellant, being the original plaintiff, has preferred this appeal under Section 100 of the Code of Civil Procedure, 1908. Here it has been contended that the trial court has committed error in rejecting the document Exh.36. It has also been argued that he learned Appellate Judge has committed illegality in holding that the appellant had failed to prove his ownership over the suit lands. On the aforesaid finding, the judgment and decree of the learned Appellate Judge has been sought to be set aside and prayed that the present appeal be allowed and the judgment and decree of the learned Appellate Judge be set aside and the judgment and decree of the learned Civil Judge be restored.

7. I have heard the learned Advocates for the parties and had perused the records. It is very clear that so far as the Second Appeal is concerned, it is governed by Section 100 of the Code of Civil Procedure, 1908 (for short 'the Code'). Section 100 of the Code says that save as otherwise expressely provided in the boody of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in apeal by any Court subordiate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

8. It is very clear that a Second Appeal is required to be disposed of and decided only on the substantial question of law. If the matter is devoid of substantial question of law, then this Court cannot enter into the merits on the facts.

9. On this point, learned Advocate for the respondents has shown two decisions. First is Smt. Satya Gupta v. Madhu Gupta, 1988 (2) GLH 723 which has been rendered by the Hon'ble Apepx Court. There it has been observed that in exercise of jurisdiction under Section 100 of the Code, finding of the lower Appellate Court cannot be reversed merely because on appeciation of evidence, another view was possible. This was an interpretation of section 100 of the Code.

10. Another decision shown to me is Ninge Gowda v. :omge Hpwda & Ors., 1997 (1) SCC 477. There it was observed that the the High Court wrongly framed an issue whether the appellant has purchased the property by sale, which was an ancestoral property having been succeeded by partition by the plaintiff and the appellant. The trial

court dismissed the appellant's suit for declaration of title but the first Appellate Court decreed the suit. The Court, on appreciation of the evidence, reversed the finding of fact recorded by the first Appellate Court. Therefore, it was held that on facts, the High Court's interference on finding of fact of the first Appellate Court which is the final Court of fact, is unwarranted.

11. The facts are reverse in the present case. In the case before us is that originally the Civil Court decreed the suit of the plaintiff and the decree was reversed now by the first Appellate Court. Now the decree of the first Appellate Court is required to be reversed in this Court applying the principle enunciated in the aforesaid decision. It has to be borne in mind that the appellant is required to prove that there is substantial question of law and then this Court can entertain a Second Appeal under section 100 of the Code only if that requirement is satisfied.

12. In the present case, the lower Appellate Court has found that the trial court has not properly appreciated the evidence and has wrongly interpreted Exh.36. It has also been observed by the First Appellate Court that the trial courut has wrongly held that the document Exh.36 which is the basis of the suit, has been proved. In fact on several circumstances, the lower Appellate Court found that the document Exh.36 was actually not proved by the appellant.

13. On this aspect, it has been contended by the learned Advocate for the appellant that this finding is wrong and illegal and it must be set aside and reversed.

14. Now this is the finding of fact. The Civil Court found that Exh.36 has been duly proved but in the first Appellate Court it has not been proved. For this purpose, several reasons have been assigned by the Appellate Court. One of the reasons is that the witness examined by the appellant had some enmity with the opposite party. There are also other reasons assigned by the first Appellate Court for not accepting the evidence of the appellant with respect to proof of the document Exh.36.

15. Learned Advocate for the appellant has contended that there is some change of ink and each person signing a document may not use same pen and same ink. This is not the only ground on which execution and contents of the document Exh.36 has not been believed by the first Appellate Court. As said above, there are numerous

considerations weighed with the first Appellate Court in not believing the document Exh.36.

16. Therefore, the first Appellate Court, on appreciation of evidence before it, came to the finding that the appellant failed to prove the document Exh.36. This finding of fact cannot be assailed in a Second Appeal in view of the provisions of Section 100 of the Code as well as in view of the aforesaid decisions of the Apex Court.

17. Therefore, this Court has to accept the document Exh.36 has not been proved by the appellant.

18. Once the said document is not held to be proved by the appellant then there is no other document on record to prove that the appellant was the owner of the suit land bearing survey nos. 348 and 349.

19. Under these circumstances, when the appellant has failed to prove substantial question of law as required under Section 100 of the Code, the present appeal would be without any merit and has to be dismissed.

20. However, considering the facts and circumstances of the case, I am of the view that the party should be left to bear their own costs so far this appeal is concerned.

This appeal is ordered to be dismissed and parties are left to bear their own costs.

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msp.